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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

SHARON TYUS; FREEMAN BOSLEY, SR.; BERTHA MITCHELL; IRVING CLAY, JR.; and CLAUDE TAYLOR,

Petitioners,

v.

FREEMAN BOSLEY, JR., in his capacity as Mayor, City of St. Louis, Missouri; THOMAS A. VILLA, in his capacity as President, Board of Aldermen, City of St. Louis, Missouri; BOARD OF ALDERMEN, City of St. Louis, Missouri; and CITY OF ST. LOUIS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

RICHARD H. PILDES
UNIVERSITY OF MICHIGAN SCHOOL OF LAW
625 South State Street
Ann Arbor, MI 48109-1215
(313) 747-1014

JUDSON H. MINER
Counsel of Record
JEFFREY I. CUMMINGS
BARACK OBAMA
DAVIS, MINER, BARNHILL & GALLAND
14 West Erie Street
Chicago, IL 60610
(312) 751-1170

Counsel for Petitioners

Midwest Law Printing Co., Chicago 60610, (312) 321-0220

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QUESTIONS PRESENTED FOR REVIEW

1. To avoid providing blacks with an equal number of seats on the St. Louis Board of Aldermen, can the existing Board of Aldermen members *intentionally* discriminate against black residents and voters by manipulating ward boundaries *for the purpose* of maximizing white voting power, without violating the Voting Rights Act, as long as the "bottom line" is that the redistricting plan creates a number of black-majority wards proportional to the percentage of black voters?

2. Should this Court resolve a conflict among the Courts of Appeals as to whether voting-age population or total population provides the legally-relevant baseline in determining whether a minority group protected under the Voting Rights Act receives proportionality in a redistricting plan?

3. Does proportionality bar a results claim under §2 of the Voting Rights Act even when dramatically different boundary-drawing practices were used in the black community than were used in the white community which resulted in minimizing black voting strength while maximizing white voting strength?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceeding in the United States Court of Appeals for the Eighth Circuit were petitioners Sharon Tyus; Freeman Bosley, Sr.; Bertha Mitchell; Irving Clay, Jr.; and Claude Taylor; and respondents Freeman Bosley, Jr., in his capacity as Mayor, City of St. Louis, Missouri; Thomas Villa, in his capacity as President, Board of Aldermen; City of St. Louis, Missouri; Board of Alderman, City of St. Louis, Missouri; and City of St. Louis.

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IN THE

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Petitioners,

v.

FREEMAN BOSLEY, JR., in his capacity as Mayor, City of St. Louis, Missouri; THOMAS A. VILLA, in his capacity as President, Board of Aldermen, City of St. Louis, Missouri; BOARD OF ALDERMEN, City of St. Louis, Missouri; and CITY OF ST. LOUIS,

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

Sharon Tyus; Freeman Bosley, Sr.; Bertha Mitchell; Irving Clay, Jr.; and Claude Taylor respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 54 F.3d 1345 and appears in Appendix A to this petition. The Eighth Circuit's order denying petitioners' petition for reconsideration and suggestion for rehearing *en banc*, with three judges dissenting, appears in Appendix B. The order of this Court granting petitioners' petition for a writ of certiorari, vacating the prior Eighth Circuit's judgment and remanding the case for consideration in light of *Johnson v. DeGrandy*, 114 S.Ct. 2647 (1994), is reported at 114 S.Ct. 2776 and appears in Appendix C. The prior opinion of the Eighth Circuit, together with the order denying petitioners' suggestion for rehearing *en banc* and the written dissent to that order by Judge McMillian, are reported at 999 F.2d 1301 and appear at Appendix D. The opinions of the district court granting defendants' motion for summary judgment and denying plaintiffs' Rule 59(e) motion to alter or amend are unpublished and appear as Appendices E and F, respectively.

STATEMENT OF JURISDICTION

The judgment of the Eighth Circuit was entered on May 12, 1995. On August 9, 1995, the Court of Appeals, with three judges dissenting, denied petitioners' suggestion for rehearing *en banc*. On October 26, 1995, this Court extended the filing date to November 28, 1995. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves §2 of the Voting Rights Act, as amended, 42 U.S.C. §1973. The relevant portion of the statute appears at Appendix G.

STATEMENT OF THE CASE

A. Statement of the Facts.

In 1991, defendant St. Louis Board of Aldermen was required to redraw its 28 aldermanic ward boundaries in accordance with the 1990 census. St. Louis is fast becoming a majority-black city. During the decade of the 1980s, black population grew by 28,000 and white population declined by 40,000, with the result that, according to the 1990 census, St. Louis' overall population was 50.2% white, 47.4% black, and 2.5% Hispanic and other minorities.[1] Its voting-age population was 55% white, 42.6% black, and 2.4% Hispanic and others (159-210). The city is strikingly segregated; over 90% of the white population live on the city's south side and north along the Mississippi River to the northernmost corner, while over 90% of the black population live on the north side and west of the riverfront (App. A-6). As a result of the population changes, at the time the 1990 redistricting began, using 1990 census and the 1980 ward boundaries, there were 13 wards with black population majorities at or

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[1] According to the Census Bureau's adjusted post-enumeration figures, St. Louis was 48.9% white, 48.5% black, and 2.5% Hispanic and other minorities (168). Note that the population figures used in the lower court opinion (App. A-5) combine Hispanic population with white population. Citations are to the pages of the record appendix filed with the Eighth Circuit ("___"), or to the record below ("R __"), or to the appendix to this petition ("App. __").

above 60%; 13 wards with white population majorities at or above 58%; and one plurality white and one plurality black ward (45-83). It was possible to draw as many as 17 "safe black" wards and as few as 11 "safe white" wards (App. A-6).[2] Thus, "maximizing" black representation would have meant creating 17 black wards.

No one proposed a redistricting plan that would have created 17 black wards. Instead, during the redistricting process, a black alderman offered a plan that provided for 14 "safe" black and 14 "safe" white wards (App. A, 5; 89). The Board of Aldermen, comprised of the then-sitting 17 white aldermen and 11 black aldermen, then adopted a plan that provided for 16 "safe" white wards in which whites have a voting-age majority (and have since elected white aldermen), 11 "safe" black wards in which blacks have a voting-age majority (and have since elected black aldermen), and one ward (the 2nd) in which blacks have a 59.4% voting-age majority but which has since elected a white alderman.

Thus, in a city almost evenly divided in population between whites and blacks, and in which black population was increasing and white population decreasing, the 17 white aldermen drew a ward map designed to preserve white political control as well as their own incumbencies throughout the decade of the 1990s. As of 1995, they have succeeded in maintaining their own seats and the overwhelming white domination of this racially-mixed but polarized city council. Plaintiffs allege that the Board of Alder-

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[2] The panel used the term a "safe ward" to mean a ward in which the racial majority has a "practical opportunity to elect the candidate of its choice" (App. A-5, n. 4). The panel also found that "in light of the uncontested presence of the *Gingles* factors . . . each safe black ward will elect a black alderman as its candidate of choice" (App. A-4, n. 3).

men accomplished this end by employing traditional racial gerrymandering techniques (84-90).

B. The Proceedings Below.

In January, 1992, plaintiffs challenged the 1991 ward map[3] on the ground that its ward boundaries were intentionally manipulated to avoid the creation of new black wards by using dramatically different districting techniques for white and black population areas. The purpose and the effect of this intentional manipulation was to minimize black voting strength and maximize white voting strength in violation of §2 of the Voting Rights Act and the 14th and 15th Amendments of the Constitution (1-18). The complaint alleged that if the same boundary-drawing practices had been employed in the white parts of town that were used in the black parts of town, blacks would constitute an effective voting majority in at least 14, or two additional wards (10). The complaint also alleged the additional *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986), prerequisites of black cohesiveness and white bloc voting, and that the black community continues to bear the burdens of a history of discrimination. Finally, plaintiffs alleged that defendants drew the map with "[t]he purpose to deny or abridge the [voting] rights of the blacks on account of race" (10).

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[3] In their complaint, plaintiffs also alleged a one-person, one-vote claim under the 14th Amendment, together with a vote dilution or racial gerrymander claim under §2 of the Voting Rights Act and the 14th and 15th Amendments. The trial court rejected plaintiffs' one-person, one-vote claim and treated plaintiffs' vote dilution and/or racial gerrymander claims under §2 and not the Constitution. On appeal, plaintiffs argued both their "results" and their "intent" claims under §2 only. They did not appeal the one-person, one-vote ruling.

Defendants admitted the *Gingles* prerequisites (App. A, 14). Before any discovery on plaintiffs voting rights claim, defendants also moved for summary judgment on the ground that the map provided blacks with the possibility of obtaining proportional representation as measured by their share of the city's voting-age population. Defendants argued that, "as a matter of law," a plan that provides proportional representation cannot violate §2 (26).[4]

On the summary judgment motion, plaintiffs' original attorneys responded without a brief but with an affidavit of their expert, Dr. Jones (84-90). *See infra* at note 7. Dr. Jones identified three techniques the defendants had used to manipulate specific ward boundaries in order to maintain white control and protect white incumbents by purposefully reducing black population and increasing white population in specific wards. Because the only facts in the record are contained in the Jones affidavit, they are set forth in detail.[5]

First, Dr. Jones concluded that defendants had maximized white voting power while minimizing black voting power by "alter[ing] ward boundaries to increase the number of white voters in wards 6, 7, and 17 . . . in order to

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[4] In support of their motion, defendants attached the affidavit of Dr. Davison who, for his §2 "proportional representation analysis" simply compared the black percentage of the city's voting-age population with the number of 60% black voting-age majority wards (32). Dr. Davison performed no analysis of the voting behavior of either the black or white population.

[5] Attached to this petition as Appendix H is a racially-coded map of the City of St. Louis with the 1991 ward boundaries. Plaintiffs offered this map as an exhibit with their *pro se* and Rule 59(e) submissions (see *infra*, at 8 n.7 and 9 n.8) and with the addendum to the brief in the Eighth Circuit. It is not, however, part of the summary judgment record as defined by the Eighth Circuit (see App. A, 10-12).

assure that black voters would not be able to elect representatives of their choice in said wards" (89).[6]

Second, according to Dr. Jones's affidavit (88):

> [defendants] fragment[ed] or split[ ] a geographically compact group of black voters among seven wards where they will constitute a voting minority in each of such wards, i.e. wards 6, 7, 8, 9, 10, 17 and 28, when they could constitute a voting age majority in two of those wards, e.g. wards 6 and 17 without such fragmentation.

The seven contiguous wards identified by Dr. Jones comprise the "central-corridor" area of the city. 100,230 persons reside in these wards, including 34,685 blacks (34.6%) who are part of a community that is both homogeneous and geographically compact enough to constitute two wards if not fractured (50, 88). The 1991 map distributes these 34,685

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[6] To see the significance of this technique, consider the following chart:

	1981 boundaries with 1990 census figures					1991 boundaries with 1990 census	
Ward	Pop.	% White	% Black	Blacks Redistricted Out	Whites Redistricted In	Pop.	% Black
6	14,100	37.1	59.6	663	1,357	14,746	52.4
7	13,298	49.9	46.6	500	1,330	14,278	39.9
17	15,680	46.1	48.8	1,980	790	14,279	39.7

Thus, under the 1981 ward map, according to the 1990 census, the 6th ward was 59.6% black and it was 67 people beneath the ideal ward population of 14,167. The ward did not have to be redrawn at all. Nevertheless, defendants altered the ward boundaries to redistrict out 663 blacks and redistrict in 1,357 whites. As a result, a 59.6% black-majority ward became a 52.4% majority (or 46% voting-age minority). Had defendants reversed the population flow, the 59.6% black majority would have been elevated to over 66% (6, 43-50, 56, 64-67). The 6th, 7th, and 17th wards are in St. Louis' central-corridor area.

blacks among the seven wards as "ineffective minorities" of 52.6% (but 45.9% of the voting-age population), 40.2%, 45.0%, 17.6%, 11.6%, 40.1%, and 34.3%, respectively (50, 88-89).

The third technique defendants used to minimize or waste black voting strength was "packing black voters into twelve wards, . . . where they constitute an overwhelming black majority in eleven of said wards in excess of 75% of the population of the wards, when black voters would have been able to elect candidates of their choice in 14 wards of less concentrated black populations . . ." (88). In other words, every black ward, including the black wards that border on the "central-corridor" area, is a packed ward, while only 11 of 17 wards that elect white aldermen are packed (56). As a result, St. Louis' 17 white aldermen are elected from wards which average 79% white population, while its 11 black aldermen are elected from wards which average 93.5% black population (50).

Dr. Jones further testified in her affidavit that boundaries were manipulated along racial lines to "maintain[] the reelection chances of white incumbents [and] prevent black voters from electing representatives of their choice" (89). An additional example of this is the city's 2nd ward, which was drawn to wind more than seven miles along the riverfront from the central corridor to the northernmost tip—picking up virtually every white voter along the way. Adjacent to the 2nd ward's seven-mile western border are five wards with black majorities of 90.1% (3rd ward), 98.0% (21st), 98.9% (20th), 98.4% (1st), and 96.4% (27th) (50).

Dr. Jones concluded that if defendants had employed the same line-drawing practices in drawing boundaries for the white-majority wards as they had used in drawing black-majority wards, and if they had treated black and white population evenhandedly, at least two additional effective

black-majority wards would have resulted (87).[7]

In reply, defendants offered no response to any of Dr. Jones's factual analysis or conclusions about intentional racial gerrymandering. Instead, they argued that evidence

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[7] Shortly after Dr. Jones's affidavit was filed, a group of the plaintiffs (the Bosley plaintiffs) filed motions with the district court advising the court that they had discharged their original attorneys because of a conflict and general dissatisfaction stemming from their lawyers' lack of experience. Because the original attorneys would not agree to the appearance of additional counsel for these plaintiffs, the Bosley plaintiffs sought leave to voluntarily withdraw and to dismiss their claims without prejudice so that they could join in a separate complaint brought by lawyers experienced in voting-rights litigation, and to consolidate the two lawsuits before the original judge (101, 122). Their original attorneys then moved to withdraw. While these motions were pending, the Bosley plaintiffs learned that their original lawyers had not only failed to file a brief in response to the defendants' motion for summary judgment but were not going to do so. Consequently, they sought to rectify counsel's lapse by seeking leave to file, *instanter* and *pro se*, a memorandum of law and two supporting affidavits in opposition to defendants' motion with exhibits including (a) the 1990 census data (which defendants had mischaracterized but not attached); (b) the 1980 and 1990 ward maps with the relevant census data; (c) two affidavits that elaborated on the claim that the boundaries were purposefully drawn along racial lines to increase the number of white voters and to decrease the number of black voters in specific wards and that the 2nd ward was not an "effective" black-majority ward (105-27). (See App. A, 10-12.) On the same day, without explanation, the trial court denied the Bosley plaintiffs' motion (128). The trial court filed its opinion three weeks later, and on that date denied plaintiffs' other motions, as well as the lawyers' motion to withdraw, as moot (141).

The district court subsequently granted summary judgment in the second lawsuit on the ground that the decision in the instant case constitutes a *res judicata* bar to any challenge to the 1991 ward map, even one brought by persons not a party to this suit. The Eighth Circuit panel refused to consolidate the two cases both before and after remand in this case, and the second litigation is currently pending before the same panel. *Miller v. Villa*, No. 93-1811.

of boundary manipulations was irrelevant because they were raising the affirmative defense of proportional representation. Relying exclusively on this "proportional representation" affirmative defense, defendants have never taken issue with Dr. Jones's conclusion that non-discriminatory redistricting would have generated *at least* two additional effective voting-age black majority wards—thus making the city council equally divided between white and black aldermen. Nor have they offered any evidence that the purposeful maximization of white-controlled wards was justified.

C. The Courts' Opinions.

1. The district court. In granting summary judgment to defendants, the district court focused exclusively on the "proportional representation" defense. The court concluded that "proportional representation bars a section 2 claim" (App. E-8). The court also asserted that "proportional representation" should be measured by the minority group's percentage of the voting-age population (App. E-9).[8]

2. Plaintiffs' first round in the Eighth Circuit. A panel of the Eighth Circuit affirmed summarily without written opinion (App. D-1). Plaintiffs' suggestion for a rehearing *en banc* was denied over Judge McMillian's written dissent, which stated:

> This case raises important legal and factual issues under the Voting Rights Act. In my view, genuine issues of material fact exist making this case wholly unsuited for summary judgment. The district court gave

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[8] The Bosley plaintiffs promptly retained new counsel who filed a Rule 59(e) motion, memorandum, and extensive supporting exhibits, and urged that the trial court take another look. On June 29, 1992, the trial court denied the motion with the observation that the "facts and issues now presented could . . . have been produced at an earlier time" (App. F-3).

> no consideration to, and made no findings concerning, serious allegations and evidence of a violation of §2 of the Voting Rights Act. In particular, I believe the district court should have made detailed findings regarding whether the City of St. Louis intentionally created its aldermanic districts to dilute African-American voting strength in violation of Section 2.

(App. D-3).

3. Proceedings in the United States Supreme Court. The Bosley plaintiffs petitioned for a writ of certiorari on the grounds that (a) proportional representation was not an affirmative defense or a bar to a §2 voting rights claim; (b) proportional representation was not an affirmative defense or a bar to an intentional racial gerrymandering claim; and (c) if proportional representation was a defense to a voting rights claim, the lower courts erred in using voting-age population, rather than total population, as the relevant population measure. On June 30, 1994, the Supreme Court issued a writ of certiorari, vacated the Eighth Circuit's judgment and remanded the case for further consideration in light of *Johnson v. DeGrandy*, 114 S.Ct. 2647 (1994).

4. Proceedings in the Eighth Circuit on remand. On May 12, 1995, the same panel reaffirmed. As the lower court read *DeGrandy*, "substantial proportionality *barred* a §2 voting dilution claim" (emphasis added) (App. A-14). The panel upheld the district court's finding of proportionality based on the finding that the 1991 ward map provides the black community with 12 "safe" wards,[9] as well as its use

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[9] It rejects the argument that there is a genuine issue of material fact as to whether the map's 2nd ward, with its 59.4% black voting-age population, is actually an "effective" black ward. Although there had been no analysis of voting behavior of blacks and whites in that ward, the panel concluded that the voting-age population is close enough to the 60% voting-age population

(continued...)

of voting-age population, and not total population, as the appropriate yardstick by which to measure proportionality because the panel saw voting-age population as the measure used by this Court in *DeGrandy* (App. A-15-17).[10]

The panel then turned to plaintiffs' argument that the trial court erred in ruling that "proportional representation" barred plaintiffs' §2 effect claim. The panel held it could affirm on a "ground supported by the record, *whether or not that ground was urged below or passed on by the district court*" (App. A-25; emphasis added). The panel proceeded to do exactly that: it converted defendants' motion for summary judgment on the proportionality affirmative defense to a motion for summary judgment on the merits. It then concluded that since Dr. Jones's affidavit failed to outweigh "the extremely heavy weight" that the proportionality factor must be given, plaintiffs had failed to show that the 1991 ward map had the effect of denying blacks an equal opportunity to participate in the political process and to elect their preferred candidates (App. A-26).

Finally, the panel rejected plaintiffs' intent claim with the conclusion that (a) "it is unclear that intent plays any role in a suit under Section 2"; and (b) "to the extent that intent plays any role in a §2 suit, it does so only in conjunction

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[9] (...continued)
threshold that the panel itself suggests is the benchmark of a "safe" black ward. *Cf.* App. A-4, n. 3.

[10] The panel also found that for purposes of determining proportionality on defendants' motion for summary judgment, the trial court correctly looked at the city as a whole, and not St. Louis' central-corridor area because plaintiffs' "pleading and proof focused citywide," as demonstrated by plaintiffs' assertion that if St. Louis "were reapportioned fairly and without discriminatory effect, blacks would constitute effective voting majorities in fourteen out of the twenty-eight wards of said city" (App. A-21). In fact, the purposeful boundary manipulation identified by Dr. Jones occurred in the "central-corridor" wards.

with a discriminatory effect." Accordingly, the lower court held that since proportionality prevented plaintiffs from proving discriminatory effect, there could be no intentional racial discrimination as a matter of law (App. A-27, n. 18).

On August 9, 1995, the Court of Appeals denied plaintiffs' petition for reconsideration or rehearing *en banc*. Chief Judge Richard S. Arnold and Judges McMillian and Murphy dissented from this denial.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted to review three important questions. First, the panel's conclusion that a claim of intentional discrimination no longer plays any role in a §2 challenge conflicts with the holdings of this Court and with those of at least four other circuits. *See City of Richmond, Virginia v. U.S.*, 422 U.S. 358, 378-79 (1975); *Shaw v. Reno*, 113 S.Ct. 2816 (1993); *DeGrandy, supra*; *Miller v. Johnson*, 115 S.Ct. 2475 (1995); *Cousin v. McWherter*, 46 F.3d 568, 572 (6th Cir. 1995); *Nipper v. Smith*, 39 F.3d 1494, 1520 (11th Cir. 1994), *cert. denied*, 115 S.Ct. 1795 (1995); *Barnett v. Daley*, 32 F.3d 1196, 1202 (7th Cir. 1994); *Garza v. County of Los Angeles*, 918 F.2d 763, 766 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991). These cases recognize that purposeful racial gerrymandering and invidious discrimination in drawing election districts is actionable under §2 and the Constitution, regardless whether a traditional vote-dilution claim under the §2 results standard can also be established.

Second, if proportionality is to be a defense to a §2 claim, as the lower court concludes, then the lower court's use of voting-age population rather than total population as the measure of proportionality raises a major issue. The text, purposes, and history of the Voting Rights Act, as well as this Court's precedents, require that total population be the

appropriate baseline. Moreover, the lower courts are split on this question, which is crucial to the ongoing administration of the Voting Rights Act.

Third, the panel also concluded that proportionality was a complete defense to a results claim under §2. Yet plaintiffs claimed and it remains factually undisputed that the Board of Aldermen used dramatically different boundary-drawing techniques in the white areas of St. Louis compared to the black areas. Plaintiffs argued that this uneven boundary manipulation constituted a violation of §2. The Eighth Circuit affirmed summary-judgment dismissal of the case before any discovery had been taken and before any factual record had been developed. This Court should grant certiorari to address whether a results claim under §2 can be barred even when redistricters employ dramatically different districting practices in white and black areas of town, with the effect being that black voting power is diluted substantially below the level it would be were districting done evenhandedly, as long as the "bottom line" of the districting plan is that it provides proportionality.

ARGUMENT

I.

THE LOWER COURT'S DECISION THAT PROPORTIONALITY DEFEATS AN INTENTIONAL RACIAL GERRYMANDERING CHALLENGE TO A SINGLE-MEMBER DISTRICT PLAN CONFLICTS WITH THIS COURT'S DECISIONS IN *DEGRANDY*, *SHAW*, AND *MILLER* AND PRESENTS AN ISSUE OF PUBLIC IMPORTANCE THAT REQUIRES CLARIFICATION BY THIS COURT.

This case presents an issue of fundamental importance to the Voting Rights Act; namely, the role of intent claims under §2. The lower court concluded that "it is no longer clear that intent plays any role in a suit under Section 2" (App. A-27, n. 18). In addition, the lower court concluded

that if "intent plays any role," it does so only if a showing of discriminatory effect identical to that required in a §2 results case is also made. The lower court found that the St. Louis plan provides blacks with proportionality, and therefore concluded that plaintiffs' intent claim had to be rejected as a matter of law.

The lower court's holding fundamentally misreads this Court's voting rights jurisprudence, as well as that of other circuits. Moreover, this holding turns the Voting Rights Act on its head by immunizing *intentional* racial discrimination as long as the "bottom line" of a single-member district redistricting plan is proportionality. In effect, the lower court has turned the Voting Rights Act into a ceiling or cap on black representation: as long as proportionality is provided, political actors are free to engage in the most blatant schemes to fragment and pack black population to maximize white political power. This cannot be the law.

When a redistricting plan is "conceived or operated as [a] purposeful device to further racial discrimination," it is actionable under §2 as well as the Fourteenth and Fifteenth Amendments. *City of Mobile v. Bolden*, 446 U.S. 55, 66-67 (1980).

With respect to §2, the circuit courts have uniformly recognized that plaintiffs can challenge a redistricting plan under §2 either on the ground that the plan is intended to deny a minority group equal opportunity or that it has that result. *See e.g.*, *Cousin v. McWherter*, 46 F.3d at 572 (the 1982 amendments "provide two separate claims for relief and . . . plaintiffs must either prove . . . intent or, alternatively, must show that the challenged system or practice . . . results in minorities being denied equal access to the political process"); *Nipper v. Smith*, 39 F.3d at 1520 (under §2 as amended, a plaintiff once again may demonstrate a violation by *either* "(1) . . . subjective discriminatory motive;

. . . or (2) the existence of discriminatory factors demonstrating discriminatory [effect]"); *Barnett v. Daley*, 32 F.3d at 1202 (Judge Posner) ("intent is not required, but it could still be usable to prove a violation that could not be inferred from a discriminatory effect"); *Garza v. County of Los Angeles*, 918 F.2d at 766 (to the extent that a redistricting plan deliberately minimizes minority political power, it may violate both the Voting Rights Act and the equal protection clause).

In *DeGrandy*, this Court explicitly recognized that in the context of a single-member districting plan, the intentional and illegal manipulation of district boundaries to prefer one race of voters over another can occur even where the plan, as a whole, provides minority voters with rough proportionality. 114 S.Ct. at 2659-61. This Court rejected precisely the argument for a "safe harbor" proportionality defense that the lower court adopted here. As this Court observed in *DeGrandy*, if proportionality provides a safe harbor, "the most blatant racial gerrymandering in half of a county's single member districts would be irrelevant under §2 if offset by political gerrymandering in the other half, so long as proportionality was the bottom line." 114 S.Ct. at 2660. Such a result, this Court observed, is "of highly suspect validity" in light of (a) the Court's repeated admonition that "a balanced bottom line does not foreclose proof of discrimination along the way," and (b) the long-recognized principle that an action "aimed at diluting black votes [is] forbidden by §5 regardless of its actual effect." 114 S.Ct. at 2661 (citing *Baird v. Consolidated City of Indianapolis*, 976 F.2d 357 (7th Cir. 1992), *cert. denied*, 113 S.Ct. 2334 (1993), and *City of Richmond v. U.S.*, 422 U.S. 358 (1975)); *see also Baird*, 976 F.2d at 360 (while proportionality defeats plaintiffs' "effect claim," proof of intentional discrimination in a §2 vote dilution case overcomes the defense of proportionality). Consistent with these cases and with Congress' pur-

poses, a claim of intentional discrimination under §2 must be actionable regardless of whether a violation of §2's "results" test has occurred.

Racial gerrymandering is actionable not only under §2, but also under the Fourteenth Amendment. In *Shaw v. Reno* and *Miller v. Johnson*, this Court recognized that race cannot be "the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." 115 S.Ct. at 2488. As *Miller* held, voters can prevail on an intentional racial gerrymander cause of action under the Fourteenth Amendment by demonstrating "either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Ibid.* *Miller* also recognized that white voters may press an intentional racial gerrymandering claim even though they enjoy substantially more than proportional representation and have suffered no discriminatory effect other than the fact that they were classified by race.

This case presents a powerful example of the type of racial gerrymandering forbidden under both *DeGrandy* and *Shaw*. Here, plaintiffs allege that, faced with a growing black population virtually equal in size and in geographical compactness to the white population, defendants purposefully drew the 1991 St. Louis ward boundaries to (a) separate voters into wards by race in order to (b) dilute the minorities' voting strength and (c) maximizing white voting strength for (d) the purpose of preserving white domination over St. Louis' legislative body. Plaintiffs do not rely solely on the facial irregularity of specific wards to support their claim. Plaintiffs point to an array of traditional gerryman-

dering techniques demonstrating that the defendants systematically manipulated the 1992 ward boundaries to capture white voters within specific wards and maximize white voting strength, and to remove black voters from specific wards and minimize their voting strength.

Dr. Jones states in her affidavit, for example, that defendants redrew the boundaries of wards 6, 7, and 17 along racial lines in order to increase white population and decrease black population for the sole purpose of restoring a white voting-age majority where blacks had become a majority or plurality of the population. At this stage of the litigation, her statement stands unrefuted. In addition, defendants drew the boundaries of the 2nd ward in a grossly irregular manner, so that it now extends over seven miles along the city's north riverfront, for the purpose of picking up virtually every white voter who resides on the city's north riverfront. The intent of this boundary manipulation was to maximize the number of wards white voters controlled. These facts are the classic indicia of an intentional racial gerrymander. *See Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Ketchum v. Byrne*, 740 F.2d 1398, 1408 (7th Cir. 1984), *cert. denied*, 471 U.S. 1135 (1985).

Plaintiffs also present a textbook claim that the Board of Aldermen purposefully manipulated the ward boundaries to dilute, cancel out, or disadvantage black voters. Plaintiffs' expert's affidavit presented evidence of the type of unevenhanded boundary manipulations that, according to *Voinovich v. Quilter*, 507 U.S. 146 (1993) should be of singular concern in a voting rights challenge to a single-member districting plan—namely that in drawing the 1991 boundaries, defendants intentionally reduced black population in specific wards to enhance white voting strength, systematically "fractured" black voters to cancel out their voting strength and "packed" black voters in neighboring wards to waste

their voting strength. Not one example exists of defendants' similarly reducing white population to enhance black voting strength, or of systematically wasting white votes by fracturing and packing white population. The result was exactly what defendants intended: in a city that is almost evenly divided between whites and blacks, the 17 white alderman adopted a ward map in 1991 that has preserved the 17 white incumbencies through the first half of the decade.[11]

As a consequence of this Court's rulings in *Shaw* and *Miller*, white voters in North Carolina or Georgia or Texas can challenge a districting plan on the basis of allegations that the map was drawn to segregate voters by race, even when the plan provides proportional representation to whites. Surely a §2 intent claim by black plaintiffs that not only alleges that race was the predominant factor in districting but that further alleges and provides detailed evidence of systematic boundary manipulation and uneven-handed "fracturing" and "packing" by a white-majority city council to purposely cancel out or waste black voting strength must be actionable. Yet the lower court rejected this symmetric treatment. The lower court concluded that a bottom line of proportionality foreclosed any need even to examine plaintiffs' proof of intentional discrimination. The lower court equated "proportionality" with "no discriminatory effect" and went on to hold that plaintiffs who could not make out an "effect claim" had no legal basis *by definition* for a claim of intentional discrimination. This holding squarely conflicts with the text, logic, and purpose of the Voting Rights Act, as well as this Court's pronouncements

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[11] In addition, plaintiffs offered undisputed evidence of racial bloc voting; political cohesiveness; depressed socioeconomic status attributable to a history of discrimination in education, housing, and employment; and a history of discrimination in electoral matters. These factors also support a finding of intentional discrimination. *Rodgers v. Lodge*, 458 U.S. 613, 622-27 (1982).

in *Richmond*, *Shaw*, *DeGrandy*, and *Miller*, and holdings of other circuits. *See Cousin*, *Barnett*, *Nipper*, and *Garza*.

II.

IF PROPORTIONALITY IS A DEFENSE TO VOTING RIGHTS CLAIMS, THE LOWER COURTS' USE OF VOTING-AGE POPULATION RATHER THAN TOTAL POPULATION AS THE MEASURE OF PROPORTIONALITY RAISES AN IMPORTANT ISSUE ON WHICH LOWER COURTS HAVE TAKEN DIVERGENT POSITIONS.

A. This Court should resolve the conflict in the lower courts regarding the proper measure of proportionality and should make clear that total population is the legally-relevant baseline.

Lower courts that have attempted to apply the "proportionality" factor to §2 effects challenges to single-member district plans cannot agree on the proper population measure. In *DeGrandy*, this Court left this question open. 114 S.Ct. at 2660, n. 11. In the instant case, the lower court nevertheless read *DeGrandy* to "at least permit, even if [it] do[es] not require, use of the voting age population as the relevant population" (App. A-16). In *Rural West Tennessee African-American Affairs Council, Inc. v. McWherter*, 836 F.Supp. 453, 462 (W.D. Tenn. 1993) (three-judge court), *vacated*, 114 S.Ct. 2657 (1994), *on remand*, 877 F.Supp. 1096 (D.Tenn. 1995) (three-judge court), *aff'd*, 116 S.Ct. 42 (1995), the lower court went one step further and read §2 and *DeGrandy* to *require* the use of voting-age population as the relevant population measure for determining proportionality.

In contrast, other courts have relied upon *Gingles* to adopt total population as the proper measure of proportionality. *See Nash v. Blunt*, 797 F.Supp. 1488, 1498-1502 (W.D.Mo. 1992) (three-judge court), *aff'd*, 113 S.Ct. 1809 (1993); *Jeffers v. Clinton*, 730 F.Supp. 196, 198 (E.D.Ark.

1989) (three-judge court), *aff'd*, 498 U.S. 1019 (1991); and *Barnett v. Daley*, 809 F.Supp. 1323, 1329 (N.D.Ill. 1992), *rev'd*, 32 F.3d 1196 (7th Cir. 1994). In *Barnett*, *supra*, 32 F.3d at 1200, Judge Posner strongly suggested that total population is a more appropriate baseline than voting age population, but did not decide the issue.

Given the lower courts' increasing reliance on proportionality as an important factor in analyzing effect claims in the single-member district context, a writ of certiorari should be issued to resolve this conflict over the appropriate manner of measuring proportionality.

B. The purpose for weighing "proportionality," as well as this Court's precedents and the language of the Act, all point to total population as the proper measure of proportionality.

The lower courts' use of voting-age population to measure proportionality[12] directly conflicts with the language of §2 and decisions of this Court which point to total population as the better measure for proportionality purposes. It is

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[12] While we assume, for the purpose of this petition, that St. Louis' blacks have proportionality as measured by voting-age population, the lower court's treatment of this case in general, and the 2nd ward in particular, is at odds with every teaching of this Court. *See supra*, n. 9. For example, in *Campbell v. Theodore*, 113 S.Ct. 2954 (1993), this Court vacated and remanded the case "for further consideration in light of the position presented by the Acting Solicitor General in his brief of May 7, 1993." In his brief, the Acting Solicitor General stated that the district court's identification of black or white districts requires an in-depth analysis of each district that includes a district-specific analysis of the "extent to which voting is polarized" and "particularized consideration of historical voting patterns, election results, or other data to support treating identified districts as black 'opportunity districts'" (brief at 14 and 15, n. 11). *Accord*, *Growe v. Emison*, 113 S.Ct. 1075, 1085 (1993). No such analysis exists here.

also at odds with the analytical purpose for considering "proportionality" as a relevant factor in a voting rights claim.

When Congress amended §2 in 1982, it expressly noted that "the principle that the right to vote is denied or abridged by dilution of voting strength derives from the one person, one vote reapportionment case of *Reynolds v. Sims*." S.Rep. No. 417, 97th Cong., 2d Sess. 19 *reported in* 1982 U.S. Code Cong. and Admin. News 177, 196. In *Reynolds v. Sims*, 377 U.S. 533, 560-61 (1964), this Court held "[t]he fundamental principal of representative government is one of equal representation *for equal numbers of people* . . ." (emphasis added). This "one-person, one-vote" principle is based on total population. In *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969), the Court recognized that "equal representation *for equal numbers of people* is a principle designed to prevent debasement of voting power and diminution of access to elected officials" (emphasis added). Reapportionment on the basis of total population guarantees equal representation and equal access to our elected officials.

The concept of proportionality or proportional representation as a measure of vote dilution derives from this one-person, one-vote principle. Proportionality, in the context of single-member district redistricting, addresses the question whether district boundaries were drawn in a manner that divides racial groups into districts in proportion to each group's share of the population used in the redistricting process. It casts light on whether the boundaries impact on racial communities evenhandedly or whether they were gerrymandered to benefit one group or another.

In the single-member district context, "proportionality" is entitled to some weight because "proportionality" can be an

indicator of whether district boundaries were drawn in a manner that treats racial groups equally and, therefore, whether the boundaries provide the minority with an *equal* opportunity to participate in the political process and to elect representatives of their choice. Under the single member plan, all residents of the jurisdiction are divided into districts of equal population. If, in this situation, the lines are drawn to divide a geographically compact minority community into the number of districts that is proportional to their share *of the population that was used to apportion the districts*, it is difficult[13] to identify the sense in which the boundaries operate to deny the minority population the "equality of opportunity" that §2 guarantees.

The same is not true, however, where voting-age population and not total population provides the baseline for measuring proportionality. Consider a city in which whites are 50% of the total population, 54% of the voting-age population, and all live on the south side of town; blacks are 50% of the total population, 46% of the voting-age population, and all live on the north side of town. Also assume that the city council is comprised of 50 single-member districts of equal population. Twenty five (50%) white-majority wards (proportionality based on total population) presumptively treats the two groups equally; 27 (54%) white-majority wards (proportionality based on voting-age population) does not. In the latter case, the map drawer can only "stretch" the white population to control two additional wards by "fracturing" black population that could have been used to create two additional black wards and putting them in white majority wards.

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[13] *See DeGrandy*, 114 S.Ct. at 2660-62; *Barnett*, 32 F.3d at 1200-01.

Equal treatment and "equal opportunity," therefore, can never be presumed from the mere presence of proportionality when (a) racial groups are highly segregated; (b) the *Gingles* preconditions (and, in particular, racial polarized voting) exists; and (c) voting-age population is the measure of proportionality. In any urban center in which the races are segregated, proportionality measured by voting-age population equates to a minimum quota of minority wards.

St. Louis is a perfect example of this phenomenon. As the lower court found, ward maps could have been drawn that ranged from 17 white and 11 black wards to 11 white and 17 black wards (App. A-6). Proportionality based on voting-age population equals 11.7 black wards, or a fraction more than the minimum that could be drawn. Proportionality in St. Louis, based on total population, equals 13.3 black wards. A ward map that provides for only 11 or 12 black wards in St. Louis can be drawn only by fracturing black population into neighboring white wards. To conclude that such a map is the benchmark for equal treatment assumes that the non-voting age minority population (which explains the population differences), is represented as effectively by the white voters into whose wards they are fractured as they would be by their parents or their black voting-age neighbors. Once the *Gingles* preconditions are satisfied, however, the court cannot make this assumption precisely because it now knows that the majority votes on the basis of race. *See Barnett*, 32 F.3d at 1200-01.

Indeed, when this Court first addressed the principle of a "proportional representation" defense to a Voting Rights Act claim in *Gingles*, the Court used *total* population, not voting-age population, as its measure: the test for establishing sustained electoral success of the minority community in a multi-member district was whether "black *residents*" had proportional representation. 478 U.S. at 74-77 (empha-

sis added); 478 U.S. at 74, n. 35; *see also United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 166 (1977) (same under §5 of the Act). The Court then observed that in North Carolina's 23rd district, "the last six elections have resulted in proportional representation for *black residents*." *Gingles*, 478 U.S. at 77 (emphasis added). It determined proportional representation by measuring the minority group's percentage of *the total population* (36.3%) with its electoral success rate (one of three electoral representatives). *Gingles*, 478 U.S. at 74, n. 35, and 478 U.S. at 104 (O'Connor, J., concurring); *see Garza*, 918 F.2d at 776 (the use of voting-age population rather than total population discriminates against minorities by diluting "the access of voting-age [minorities] . . . to their representatives, and would similarly abridge the right of . . . minors to petition their representatives"); *Barnett*, 32 F.3d at 1200 (total population may be a better index than voting-age population); *DeWitt v. Wilson*, 856 F.Supp. 1409, 1415 (E.D.Cal. 1994) (three-judge court), *aff'd in part and appeal dismissed in part*, 115 S.Ct. 2637 (1995) (rejecting the equal protection claim that the use of total population "unduly minimizes white voter strength" since whites have higher registration rates on the ground that "population, not voter registration, is the appropriate basis for apportioning districts"). As long as the wards are apportioned on the basis of total population, proportionality, as evidence of equal treatment, is best measured by the same population base.

The Act itself supports the use of total population in measuring proportionality. Section 2 disavows a minority's right to proportional representation in the following language: "Nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion *in the population*" (emphasis added). While this proviso "speaks to the success of minority candidates" (*see*

114 S.Ct. at 2658, n. 11), it also addresses the measure of electoral power of minority voters. This language has its origins in *City of Mobile*, 446 U.S. at 66-67, and this Court's recognition that in proving that a reapportionment purposefully minimized or cancelled out the voting potential of racial or ethnic minorities, "it is not enough to show that the group allegedly discriminated against has not elected representatives in proportion to its numbers." In other words, minority plaintiffs must show more than the fact that they have lacked the electoral power to elect a proportional number of candidates of their choice. As is clear from the debates over the 1982 amendments that led to the amended "results" standard, Congress viewed "proportional representation" as a measure of a minority's electoral power. *See* S.Rep. No. 417, 97th Cong., 2d Sess. 19, at 340.

If total population is abandoned as the proper measure and replaced with the "electorate," the courts will have to resolve numerous further questions. For example, rather than using voting-age population to define the "electorate," courts might be asked to use citizen voting-age population: only the latter represents the actual electorate. In St. Louis, the voting age citizen population is approximately 55% white and 44% black. U.S. Dept. of Commerce, 1990 Census Summary Tape File 1-B and 3-A. Using *this* measure, blacks do not have proportionality under the current districting plan. Moreover, according to the census, the adjusted citizen voting-age population (or the real "electorate") is 53.5% white and over 45% black—yet whites have voting-age majorities in 57.1% of the wards and have elected their alderman of choice in 60.7% of the wards while blacks have a voting-age majority in 42.8% of the wards and have elected their candidate of choice in 39.2%. Total population provides a principled, easily-administrable standard of representation in the Voting Rights Act context just as it

has in the one-person, one-vote context. Once courts begin to attempt to impose a different standard, it will fuel continual litigation under §2.[14]

III.

PROPORTIONALITY DOES NOT DEFEAT PLAINTIFFS' §2 RESULTS CLAIM WHEN DIFFERENT BOUNDARY-DRAWING PRACTICES WERE USED IN THE BLACK COMMUNITY THAN WERE USED IN THE WHITE COMMUNITY WHICH RESULTED IN MINIMIZING BLACK VOTING STRENGTH WHILE MAXIMIZING WHITE VOTING STRENGTH.

Over the past two terms, in *Growe*, *Voinovich*, and *DeGrandy*, this Court has articulated the appropriate framework for analyzing §2 result challenges to single-member district plans. According to the Court, "the *Gingles* factors cannot be applied mechanically and without regard to the nature of the claim." *DeGrandy*, 114 S.Ct. at 2655, *quoting Voinovich*, 113 S.Ct. at 1157. Justice O'Connor, writing for a unanimous court in *Voinovich*, explained that in the single-member district context, "the usual device for diluting minority voting power is the manipulation of district lines," and that in single-member districts:

> dilution of racial minority group voting strength may be caused either by dispersal of blacks into districts in which they constitute an ineffective minority of voters [fracturing] or from the concentration of blacks into

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[14] In light of the clear and convincing evidence that black population was seriously undercounted in the last census, any proportionality analysis works to their detriment. *See City of New York v. U.S. Dept. of Commerce*, 822 F.Supp. 906, 913 (E.D.N.Y. 1993), *cert. granted*, 116 S.Ct. 38 (1995); *Assembly of State of Cal. v. U.S. Dept. of Commerce*, 968 F.2d 916, 917 (9th Cir. 1992). This unfairness is obviously compounded by the use of voting-age population as the measure.

> districts where they constitute an excessive majority [packing].

DeGrandy, 114 S.Ct. at 2659 (emphasis added). St. Louis presents precisely the type of inconsistent treatment that supports a §2 violation, even in the face of proportionality.

For example, the 1991 ward boundaries "fracture" blacks *but not* whites. In the seven central-corridor wards reside 100,230 persons, of whom 34,685 (34.6%) are black. These 34,685 blacks, who could be part of black-majority wards, are, instead dispersed into seven wards in each of which they constitute an ineffective voting minority. *See supra* at 6-7. Yet, there is no comparable dispersion of white voters. All of the white voters in this seven central-corridor ward area were placed in white-majority wards. Similarly, the current map distributes whites across the wards in a far more efficacious fashion than blacks. Over 90% of the city's white population reside within a contiguous boundary on the city's south side and north along the Mississippi River. Likewise, over 90% of the black population reside within a contiguous boundary on the city's north side and west of the riverfront. The 17 wards that have elected white aldermen are, on average, 79% white; while the 11 wards that have elected black aldermen are, on average, 93.5% black in population. This disparate treatment is not dictated by the hyper-segregated housing pattern or by any traditional redistricting standards. A map that "packed" and/or "fractured" whites and blacks evenhandedly, and used traditional redistricting standards, would result in the same number of black wards as white wards, thus requiring cross-racial cooperation in matters of local governance.

Finally, defendants manipulated ward boundaries to restore white voting-age majorities in wards that had become majority or plurality black and did not need to be redrawn, but never created a black voting-age majority ward

where whites were a majority or plurality of the population. Unevenhanded boundary manipulation of this sort denies blacks the opportunity to participate equally in the political process.

This Court should be aware that absolutely no discovery or factual development has yet taken place on these §2 result claims. The Eighth Circuit has handled this case in a procedurally novel manner. The district court granted summary judgment on the legal ground that "proportional representation" was a complete defense to all §2 claims; the Eighth Circuit initially affirmed on this ground. Yet when this Court vacated and remanded, the Eighth Circuit reaffirmed summary judgment on the completely new ground that plaintiffs could not prove their case on the merits.[15] This ground was never briefed or argued by the parties, either in the initial district court proceeding or before the Eighth Circuit.

The Eighth Circuit felt free to ignore the procedural posture of a summary judgment motion because, in its view, it "reviews judgments, not opinions." Thus, an appellate court can affirm summary judgment on grounds neither "urged below or passed on by the district court" (App. A-25). Such an understanding of the relationship between appellate and district courts represents a radical departure from the controlling decisions articulated by this Court and those of every other circuit. Those decisions uniformly and properly condemn appellate-level summary judgment on factual issues not specifically litigated below.

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[15] Even this limited record should have been enough if the Eighth Circuit adhered to this Court's teaching that, at this summary stage, Dr. Jones's evidence "is to be believed and all justifiable inferences are to be drawn in [the non-movant plaintiffs'] favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

Dr. Jones's affidavit clearly raises genuine disputes over whether the boundaries diluted black voting strength. But even if it did not, that issue was never raised in the summary judgment motion, briefs, or arguments. Moreover, the predicate for the rare instance of appropriate appellate review of a trial court's summary judgment on a ground that was never urged below is a determination that the non-moving party had (a) adequate notice of the issue on which evidence is being demanded; (b) full discovery on the issue that forms the basis for the motion; and (c) a fair opportunity to develop and present all pertinent evidence. *See Fountain v. Filson*, 336 U.S. 681, 683 (1949); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-25 (1986); *see also Hartman v. Board of Trustees of Community College Dist. No. 508, Cook County, Ill.*, 4 F.3d 465, 469 (7th Cir. 1993); *Bonilla v. Nazario*, 843 F.2d 34, 37 (1st Cir. 1988); *Tavery v. U.S.*, 32 F.3d 1423, 1427, n. 5 (10th Cir. 1994); *Buckingham v. U.S.*, 998 F.2d 735, 740 (9th Cir. 1993); *John Deere Co. v. American Nat. Bank, Stafford*, 809 F.2d 1190, 1191 (5th Cir. 1987); *Mariash v. Morrill*, 496 F.2d 1138, 1145 (2d Cir. 1974). If the practice were otherwise, plaintiffs opposing a summary judgment on a specific issue would have no choice but to offer evidence and argument on every conceivable element of their case.

Plaintiffs have had no discovery as of yet. Nor were they ever on notice that they were going to have to *prove the facts* of their §2 results claim at this stage. At a minimum, this Court should grant the writ, vacate, and remand the decision below for analysis of the totality of the circumstances based on a fully-developed record in light of this Court's most current voting rights jurisprudence.

Alternatively, this Court should hold this petition pending disposition of the appeal in *Voinovich v. Quilter*, 116 S.Ct. 42 (1995).

CONCLUSION

For all of the reasons stated above, a writ of certiorari should be issued to review the judgment and opinion of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

RICHARD H. PILDES
UNIVERSITY OF MICHIGAN SCHOOL OF LAW
625 South State Street
Ann Arbor, MI 48109-1215
(313) 747-1014

JUDSON H. MINER
Counsel of Record
JEFFREY I. CUMMINGS
BARACK OBAMA
DAVIS, MINER, BARNHILL & GALLAND
14 West Erie Street
Chicago, IL 60610
(312) 751-1170

Counsel for Petitioners